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IN THE

Supreme Court of the United States

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October Term
No. .....

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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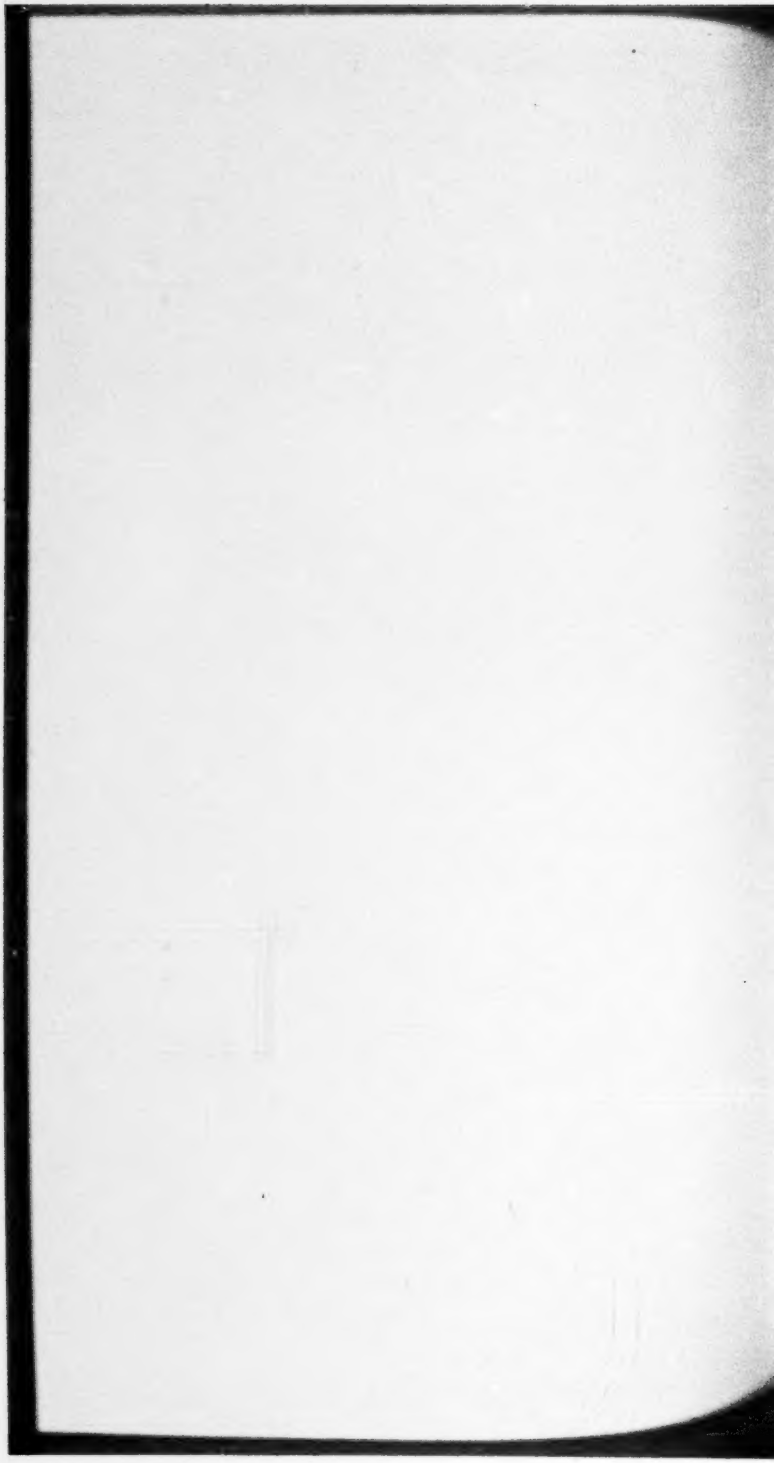

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vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Order and Opinion of the Court Below.

The petitioner, Bank of America National Trust and Savings Association (hereinafter referred to as "Petitioner" or "Bank"), respectfully prays a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the cases of United States of America, Libelant-Appellee, vs. One 1967 Ford Mustang, Defendant, Bank of America, Claimant-Appellant, No. 25827; United States of America, Libelant-Appellee, vs. One 1965 Ford Country Wagon, Defendant, Bank of America, Claimant-Appellant, No. 25830; and United States of America, Libelant-Appellee, vs. One 1965 Chevrolet, Defendant, Bank of America, Claimant-Appellant, No. 26055.

The Findings of Fact, Conclusions of Law, and Judgment of the United States District Court for the Central District of California were entered on March 25, 1970, March 11, 1970 and May 20, 1970 respectively. They are not reported, but appear in the printed appendix filed herewith (A 5-16) and will be part of the record to be certified by the clerk of the United States Court of Appeals for the Ninth Circuit.

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming said judgments (which were consolidated for Appeal) was filed on March 21, 1972, and is not yet reported, but is set forth in petitioner's appendix hereto (A 17-19), and will be part of the record to be certified.

Statement of Jurisdiction.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming said judgments of the District Court was filed on March 21, 1972, and is printed in the appendix hereto (A 17-19). This petition is filed within 90 days of the Order of the United States Court of Appeals for the Ninth Circuit. The jurisdiction on this court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

1. WHETHER THE APPLICABLE FEDERAL FORFEITURE STATUTES (49 USC Secs. 781, 782) ARE PENAL IN NATURE AND IF SO, WHETHER THE DECISION OF THE NINTH CIRCUIT IS IN CONFLICT WITH THE RECENTLY EXPRESSED VIEWS OF THIS COURT IN *United States v. U.S. Coin & Currency* (1971), 401 U.S. 715, 28 L. Ed. 2d 434, 91 S.Ct. 1041.

2. WHETHER THE APPLICABLE FEDERAL FORFEITURE STATUTES (49 USC Sec. 781,782) ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION IN THAT THEY ARE UNCONSTITUTIONALLY VAGUE AND FAIL TO GIVE FAIR NOTICE OF CONDUCT REQUIRED BY AN INNOCENT LIENHOLDER IN ORDER TO PROTECT HIMSELF FROM PENAL SANCTION.

3. IF SECTIONS 781 AND 782 OF TITLE 49 OF THE UNITED STATES CODE ARE HELD TO BE CIVIL IN NATURE DOES NOT THE FORFEITURE OF AN INNOCENT LIENHOLDER'S INTEREST IN PERSONAL PROPERTY THEREUNDER CONSTITUTE A TAKING OF PROPERTY FOR A PUBLIC USE WITHOUT PAYMENT OF JUST COMPENSATION AS REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Constitutional Provision and Statute Involved.

1. The Fifth Amendment to the United States Constitution Provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The statutes involved are Sections 781 and 782 of Title 49 of the United States Code, the pertinent portions of which are:[1]

§781

(a) "It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale barter, exchange, or giving away of any contraband article.

(b) As used in this section the term "contraband article" means—

. . . (3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security. Aug. 9, 1939, c. 618 § 1, 53 Stat. 1291; Aug. 9, 1950, c. 655, 64 Stat. 427.

§782

"Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: . . . Aug. 9, 1939, c. 618 § 2, 53 Stat. 1291."

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[1]The full text of Sections 781 and 782 of Title 49 of the United States Code are attached hereto as part of Petitioner's Appendix. (A 1-2.)

3. The regulation involved is Title 31, Part 15, Section 15.1 of the Code of Federal Regulations. The full text of said regulation is attached hereto as part of Petitioner's Appendix. (A 3-4.)

Statement of the Cases.

Case No. 25827.

On December 4, 1968 the Complaint for Forfeiture was filed in the United States District Court for the Central District of California seeking to forfeit the defendant 1967 Ford Mustang pursuant to 49 U.S.C. §782. The complaint alleged that on June 27, 1968 one George L. Owen (hereafter referred to as "Owen") used and intended to use said vehicle to facilitate the transportation of counterfeit Federal Reserve Notes contrary to the provisions of 49 U.S.C. §781, and that on June 27, 1968 duly authorized agents of the U.S. Secret Service, Treasury Department of the United States seized said defendant's 1967 Ford Mustang.

On or about January 15, 1969 Petitioner filed its claim and Answer to Complaint for Forfeiture and Counterclaim, wherein Petitioner claimed it was entitled to the said defendant Ford Mustang by virtue of a conditional sales contract executed by Owen covering said vehicle upon which there is an unpaid balance due Petitioner of $1,580.97. Petitioner further denied that the vehicle was forfeit to the United States of America and set forth all the Constitutional issues raised herein.

On February 9, 1970, the case was heard by the Honorable Thurmond Clarke, sitting without a jury, and taken under submission. On March 25, 1970, the court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the defendant 1967 Ford Mustang forfeit to the United States.

The court found in essence that the defendant 1967 Ford Mustang had been used and intended for use by Owen to facilitate the transportation of counterfeit Federal Reserve Notes and that there was probable cause for its seizure. The court also found that Petitioner was the legal owner of said vehicle and was innocent of any wrongdoing but that innocence of the Bank was no defense to Forfeiture of its security interest. (A 7-8.)

Case No. 25830.

On June 17, 1969 the Complaint for Forfeiture was filed in the United States District Court for the Central District of California seeking to forfeit the defendant 1965 Ford Country Sedan Station Wagon pursuant to 49 U.S.C. §782. The complaint alleged that on August 10, 1968 one Daniel Migdol (hereafter referred to as "Migdol") used and intended to use said vehicle to facilitate the transportation of counterfeit Federal Reserve Notes contrary to the provisions of 49 U.S.C. §781 and that on August 10, 1968 duly authorized agents of the U.S. Secret Service, Treasury Department of the United States seized said defendant 1965 Ford Country Sedan Station Wagon.

On or about July 16, 1969 Petitioner filed its claim and Answer to Complaint for Forfeiture and Counterclaim, wherein Petitioner claimed it was entitled to the said defendant 1965 Ford Country Sedan Station Wagon by virtue of a conditional sales contract executed by Migdol covering said vehicle upon which there is an unpaid balance due Petitioner of $1,772.87. Petitioner further denied that the vehicle was forfeit to the United States of America and set forth all the Constitutional issues raised herein.

On February 9, 1970 the case was heard by the Honorable Thurmond Clarke, sitting without a jury, and taken under submission. On March 11, 1970 the court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the defendant 1965 Ford Country Station Wagon forfeit to the United States.

The court found in essence that the defendant 1965 Ford Country Sedan Station Wagon had been used and intended for use by Migdol to facilitate the transportation of counterfeit Federal Reserve Notes and that there was probable cause for its seizure. The court also found that Petitioner was the legal owner of said vehicle and was innocent of any wrongdoing but that innocence of the Bank was no defense to Forfeiture of its security interest. (A 11-12.)

Case No. 26055.

On December 4, 1968 the Complaint for Forfeiture was filed in the United States District Court for the Central District of California seeking to forfeit the defendant 1965 Chevrolet 2-Door Hardtop pursuant to 49 U.S.C. §782. The complaint alleged that on May 10, 1968 and June 5, 1968 one Bernard A. Shapiro (hereafter referred to as "Shapiro") used and intended to use said vehicle to facilitate the transportation of counterfeit Federal Reserve Notes contrary to the provisions of 49 U.S.C. §781 and that on June 28, 1968 duly authorized agents of the U.S. Secret Service, Treasury Department of the United States seized said defendant 1965 Chevrolet 2-Door Hardtop.

On or about January 14, 1969 Petitioner filed its claim and Answer to Complaint for Forfeiture and Counterclaim, wherein Petitioner claimed it was en-

titled to the said defendant 1965 Chevrolet 2-Door Hardtop by virtue of a conditional sales contract executed by Shapiro covering said vehicle upon which there is an unpaid balance due Petitioner of $1,622.40. Petitioner further denied that the vehicle was forfeit to the United States of America and set forth all Constitutional issues raised herein.

On April 27, 1970 the case was heard by the Honorable Thurmond Clarke, sitting without a jury, and taken under submission. On May 20, 1970 the court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the defendant 1965 Chevrolet, 2-Door Hardtop forfeit to the United States.

The court found in essence that the defendant 1965 Chevrolet, 2 Door Hardtop had been used and intended for use by Shapiro to facilitate the transportation of counterfeit Federal Reserve Notes and that there was probable cause for its seizure. The court also found that Petitioner was the legal owner of said vehicle and was innocent of any wrongdoing but that innocence of the Bank was no defense to Forfeiture of its security interest. (A 13-16.)

The Appeals.

Notices of Appeal were filed in a timely manner in each case. (Case No. 25827—Notice of Appeal filed April 7, 1970; Case No. 25830—Notice of Appeal filed March 17, 1970; Case No. 26055—Notice of Appeal filed May 28, 1970).

On December 8, 1970 counsel for the United States and counsel for Bank entered into a stipulation pursuant to Rule 3(b), Federal Rules of Appellate Procedure, that the three appeals might be consolidated. Consolidation was so ordered on December 11,

1970 by the Honorable Richard H. Chambers, Circuit Judge.

On October 4, 1971 the consolidated cases were heard by the Honorable Richard H. Chambers, Walter Ely, Circuit Judges, and the Honorable James F. Battin, United States District Judge, sitting by designation.

On March 21, 1972 the United States Court of Appeals for the Ninth Circuit entered its Judgment and Order affirming the Trial Court decisions in the three consolidated cases. (A 17-19.)

Statement of the Facts.

Case No. 25827.

On January 10, 1968 Owen purchased the subject vehicle from Jim Snow Ford and executed the motor vehicle security agreement for balance of the purchase price [Ct. 12].[2] Concurrently therewith, Owen submitted a Credit Statement [Ct. 16] for the purpose of having the Bank finance said agreement by taking an assignment thereof from said dealer. Pursuant to the Bank's normal course of business practice it initiated a credit investigation in order to determine whether Owen's credit was such as would qualify said agreement for purchase by the Bank [Rt. 16, 15-17].[3]

The Bank's credit investigation was thorough and included the verification of Owen's employment and

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[2]Ct. as used herein refers to the clerk's transcript which is part of the record of the U.S. District Court for the Central District of California which record will be certified to this court by the Circuit Court of Appeals for the Ninth Circuit if Certiorari should be granted.

[3]Rt. as used herein refers to the reporter's transcript which will be part of the record hereinabove described in Footnote No. 1.

a check with the local credit exchange through the Retail Credit Bureau [Ct. 15] and a check with the Commercial Credit Corporation, which is another credit exchange company [Ct. 14]. The credit investigation did not disclose any derogatory information concerning Owen's credit or that he had any history for commercial crimes [Ct. 14-16].

The insurance company also performed an independent investigation of Owen's driving record through the Department of Motor Vehicles and in case such check reveals unfavorable information, the applicant's insurance premium payments are increased by billing the Bank [Rt. 9, 14-23]. The Bank did not receive any additional charge or billing from the insurance company on Owen's application [Rt. 10, 3-5]. The Bank did not inquire of the Bureau of Narcotics and Dangerous Drugs or the Bureau of Customs or the Los Angeles County Clerk (Criminal Records) to determine whether Owen had any record for commercial crimes. Had it done so Bank would have received a negative response from the Bureau of Narcotics and Dangerous Drugs as well as from the Bureau of Customs, but would have received a positive reply from the Los Angeles County Clerk [Ct. 24].

Based upon the favorable credit information the Bank purchased said agreement from said dealer and accepted an assignment thereof on January 17, 1968 [Ct. 13] thereby becoming the legal owner of the subject vehicle [Ct. 23].

Approximately six months later the subject vehicle was used by Owen to facilitate the transportation of counterfeit $10 Federal Reserve Notes contrary to the provisions of 49 U.S.C. Section 781. Said use was without the knowledge or consent of the Bank [Ct. 10] and on or about June 27, 1968 Special Agents of the United States Secret Service seized the subject vehicle [Ct. 24].

The bank filed a Petition for Remission of the subject vehicle because there was an unpaid balance due in the sum of $1,580.97 on said agreement, which petition was denied by the Attorney General of the United States. Said denial was based on the fact that the Bank had not made any inquiry as to Owen's record for commercial crimes with either the Bureau of Customs, the Bureau of Narcotics and Dangerous Drugs or the Los Angeles County Clerk (Criminal Records) [Ct. 24].

Petitions are granted if there is no record of commercial crime, or if there is a record of commercial crime at any of the aforementioned three agencies, and an inquiry is made to the agency which does not have a record and it gives a negative reply [Ct. 24].

Case No. 25830.

The basic operative facts in case no. 25830 are substantially identical to those found in case no. 25827, but the unpaid balance due on the conditional sales contract is $1,772.87. The Bank did not inquire into Migdol's record for prior commercial crimes. Had it

done so the Bank would have received a positive response from the Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, but would have received a negative reply from the Los Angeles County Clerk.

Case No. 26055.

The basic operative facts in case no. 26055 are substantially identical to those found in case no. 25827, but the unpaid balance due on the conditional sales contract is $1,622.40. The Bank did not inquire into Shapiro's record for prior commercial crimes. Had it done so Bank would have received a negative response from the Bureau of Narcotics and Dangerous Drugs and from the Bureau of Customs, but would have received a positive reply from the Los Angeles County Clerk.

ARGUMENT.

1. Sections 781 and 782 of Title 49 of the United States Code Are Penal in Nature, and Therefore the Decision Rendered by the Ninth Circuit Appears to Be in Direct Conflict With the Recently Expressed Views of the United States Supreme Court in the Case of United States v. U.S. Coin and Currency (1971), 401 U.S. 715, 28 L. Ed. 2d 434, 91 S.Ct. 1041.

Section 782 of Title 49 U.S.C. provides in pertinent part as follows:

> "Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited . . . Aug. 9, 1939, c. 618 §2, 53 Stat. 1291."

Bank recognizes that in the past forfeiture proceedings have been construed as "proceedings in rem" rather than as criminal prosecutions. (*Dobbins v. U.S.*, 96 U.S. (6 Otto) 395, 24 L. Ed. 637 [1877]; *Goldsmith-Grant Company v. U.S.*, 254 U.S. 505, 65 L. Ed. 376, 41 S. Ct. 189 [1920]).

Bank contends, however, that the law is not stagnant but instead adapts itself to change by necessarily facing the realities of a situation. The artificial and legalistic concept of forfeiture being a "proceeding in rem" cannot stand in the face of one basic truth. That truth is simply that AN INNOCENT PARTY IS DEPRIVED OF HIS PROPERTY INTEREST AS A PUNISHMENT. In fact it has been held that the forfeiture statute in question here (49 U.S.C. 782) is a

penal statute. (*United States v. One 1947 Oldsmobile Sedan*, 104 F. Supp. 159; *United States v. One 1962 Ford T-Bird*, 232 F. Supp. 1019).

In construing such statutes the courts have said:

> "A statute whereby a man may be deprived of his personal property *by way of punishment* should be construed with strictness." *United States v. Five Gambling Devices*, 252 F. 2d 210, 213, *Hannifin v. U.S.*, 248 F. 2d 173.

In construing a state forfeiture statute similar to 49 U.S.C. §781 and §782 the United States Supreme Court has held that such forfeiture statutes are penal in nature. In *One 1958 Plymouth Sedan v. Pennsylvania* (1965), 380 U.S. 693, 14 L. Ed. 2d 170, 85 S. Ct. 1246, the Supreme Court stated:

> "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form are in their nature criminal." [citing *Boyd v. United States*, 116 U.S. 616].

As recently as April of 1971 this court has indicated strongly that the time has come to strike these forfeiture proceedings as violative of basic Fifth Amendment guaranties. In discussing forfeiture under 26 U.S.C. §7302, (as it relates to the Fifth Amendment protection against self-incrimination), Mr. Justice Harlan, speaking for the majority of the Supreme Court, stated in *United States v. U.S. Coin and Currency* (1971), 401 U.S. 715, 28 L. Ed. 2d 434, 91 S.Ct. 1041:

> "Since, under the Government's view, the guilt or innocence of the actual owner of the money is

irrelevant in an action under §7302, the Government urges that the present forfeiture should not be considered the result of a 'criminal' proceeding for Fifth Amendment purposes . . .

"It would appear then that history does support the Government's contention regarding the operation of this forfeiture statute, as do several decisions rendered by the courts of appeals. But before the Government's attempt to distinguish the *Boyd* case could even begin to convince, we would have first to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be 'deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.' Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism. And this court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. See, e.g., *Goldsmith-Grant Co. v. United States, supra.* Cf. *United States v. One Ford Coach,* 307 U.S. 219, 236-237 (1939).

"When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows from *Boyd, Marchetti,* and *Grosso* that the Fifth Amendment's privilege may properly be

invoked in these proceedings." (*U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 720-722, 28 L. ed. 2d 434, 438-439).

As hereinafter discussed the Bank is being penalized for its failure to make inquiries to law enforcement agencies. In no way has the Bank become involved, significantly or otherwise, in a criminal enterprise. The District Court made a specific finding that the Bank was innocent of wrongdoing in each case. If the forfeitures herein challenged are allowed to continue they do so in contravention of the recently expressed view of this court as to the purpose and intent of the said procedures. It therefore appears that the decision of the Circuit Court of Appeal for the Ninth Circuit is in direct conflict with the above recently expressed view of this court.

2. If Sections 781 and 782 of Title 49 of the United States Code Are Penal in Nature, They Violate Due Process Under the Fifth Amendment to the United States Constitution in That They Are Unconstitutionally Vague and Fail to Give Fair Notice of the Conduct Required of an Innocent Lienholder in Order to Avoid Its Penalties.

The Bank contends that these sections are unconstitutionally vague in that they fail to establish any criteria whereby an innocent lienor can protect his interest. In fact the Bank is being penalized for the "crime" of financing an automobile. The U.S. Supreme Court has consistently held that a criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties. (*Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340; 96 L. Ed. 367; 72 S.Ct. 329; *United States v. Cardiff*, 344 U.S. 174, 97 L. Ed. 200, 73 S.Ct. 189).

More specifically the Supreme Court has stated:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." (*Connally v. General Construction Co.*, 269 U.S. 385, 393, 70 L. Ed. 322, 329, 46 S.Ct. 126).

49 U.S.C. §782 provides that a vehicle is forfeited if it is used unlawfully under the provisions of 49 U.S.C. §781. This latter section provides that it shall be unlawful to transport in, or conceal within, or use for the purpose of sale of contraband articles, any vessel, vehicle, or aircraft. The Bank maintains that *it* has never transported contraband in any vehicle. Nor has *it* concealed or possessed any contraband in any vehicle. Nor has *it* used any vehicle to facilitate the sale, conveyance or possession of any contraband. What crime has the Bank committed which would put it on notice that its interest in a vehicle is subject to forfeiture? On its face the *statute* does not specify any such crime. Nor does the statute indicate a course of conduct upon which an innocent lienholder may embark in order to protect its interest. It is upon this ground that the Bank bases its contention that the statute is vague and unclear and therefore void under the Due Process Clause of the Fifth Amendment.

Traditionally the answer to the above argument has been twofold. First, the Government asserts that the

forfeiture is not penal in nature. That *in fact* it is penal has already been noted above. Secondly, the Government points to Title 31, Part 15 of the Code of Federal Regulations which sets forth the policy of the government with respect to remission and mitigation of forfeitures occurring under 49 U.S.C. §782. The "standards" by which an innocent lienholder may protect his interest are allegedly set forth therein. In pertinent part the Regulation (§15.1) provides:

> "The Treasury Department desires to point out that in its exercise of its discretion it is guided by a standard similar to that which the Congress has established in 18 U.S.C. 3617(b) with respect to the mitigation and remission by courts of forfeitures in connection with violations of the liquor laws. In the relevant part that section provides that remission or mitigation shall not be allowed on behalf of any claimant 'if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or any State relating to liquor has a right with respect to such vehicle or aircraft, [unless it appears] that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person then resided,

and of each locality in which claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation.' "

These so-called standards are objectionable on several grounds. First, they appear in the Regulations as a prerequisite to *remission*. They appear after the fact of forfeiture. There is no regulation setting forth procedures which must be followed by a lending institution which said lender would be likely to be aware of *prior* to a forfeiture. In summary, the standard which must be followed is set forth in a regulation which would not come to the attention of the lender in the ordinary course of business until it has become too late to comply therewith. Further, the regulation fails to provide for notice and a hearing prior to forfeiture, which failure constitutes a deprivation of property without due process:

> "The constitutional right to be heard is a basic aspect of the duty of government when it acts to deprive a person of his possessions." *Fuentes v. Shevin* (1972), Supreme Court Docket No. 70-5039. Oral argument heard November 9, 1971, Decided June 12, 1972. (No official citation yet available.)

Additionally, the regulation is vague and unclear. It fails to state whether the lienholder must check for a criminal record with all or only with one of the law enforcement agencies named. If the lienholder checks with only one such agency he may forfeit his interest even if he received a negative response. At the same time it would be commercially impractical to check with each agency. For example, Petitioner in Southern Cali-

fornia alone finances in excess of 1,000,000 cars per year. If Bank were required to call each law enforcement agency listed this would mean 3,000,000 additional phone calls per year, or figuring 264 working days per year, approximately 11,360 calls per day. Assuming one minute per call (a most generous assumption), at least one hundred and seventy work hours per day would be consumed. The lender is left in a quandary since he is *not* told which procedure to follow by the regulation and thus he has no way of knowing whether his interest is protected or not.

In these consolidated cases the statement of facts indicates that had the Bank called the agencies it would have received negative responses in most instances, but positive responses from one or more of the three agencies in each case. Would the Bank have been safe to call only one agency in each case? Must it call all three? Nowhere in the statutes or the Regulation is the necessary procedure set forth. For this reason alone the Regulation and Statute appear so uncertain as to violate due process as being overly broad and vague.

Further, assuming *arguendo* that a call to any one agency would protect the lienholder's interest, the government does not contest the claim of the Bank that if such calls were made the agencies lack sufficient staff and facilities to service the requests. Thus even if the lienholder knew what was necessary to protect its interests, performance would be factually impossible. The law does not require impossible acts and under those facts the very act required would be futile.

Finally, this regulation is vague and unclear in that it does not accurately define the term "locality in which such other person acquired his rights." In *Connally v. General Construction Co.*, (269 U.S. 385, 70 L. Ed.

322, 46 S.Ct. 126) the court states at pages 394-395:

> ". . . additional obscurity is imparted to the statute by use of the qualifying word 'locality.' Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? . . . It is said that this question is settled for us by the decision of the State Supreme Court on rehearing in *State v. Tibbetts* [citation]. But all the court did there was to define the word 'locality' as meaning 'place', 'near the place', 'vicinity', or 'neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties."

In view of the foregoing the Bank contends that both the statute under which forfeiture was declared and the underlying regulation purporting to establish guidelines of conduct are vague and uncertain and that the procedures set forth therein are therefore violative of Due Process under the Fifth Amendment.

3. If Sections 781 and 782 of Title 49 of the United States Code Are Held to Be Civil in Nature the Forfeiture of an Innocent Lienholder's Interest in Personal Property Thereunder Constitutes a Taking of Property for a Public Use Without Payment of Just Compensation as Required by the Fifth Amendment to the United States Constitution.

There is no question that forfeiture of the lienholder's interest constitutes a "taking" of personal property. The issue is whether this taking is an exercise of the power of eminent domain which requires the government to pay just compensation under the Fifth Amendment. The Bank contends that it is such a taking. Naturally the government contends that the forfei-

ture proceedings constitute a regulation for the public welfare and are an exercise of the so-called "police power" and that thus there is no taking for public use which is compensable under the Fifth Amendment.

If the Bank were a guilty party participating knowingly in some crime there might be some merit to the government's position. The cars could be forfeited as instrumentalities of the crime itself in the interest of public welfare. But the Bank's property interest is forfeited not because it participated in a crime but because, in carrying out its *lawful business,* it had the misfortune to loan money secured by a vehicle which was subsequently used *without the knowledge or permission of the Bank* by the registered owner to commit a crime. Bank contends that the public welfare does not require the forfeiture of its interest, since Bank has committed no crime and has no intention of committing a crime. It is submitted that the forfeiture of the wrongdoer's interest would be more than ample protection for the public welfare, and that the forfeiture of the Bank's interest, not being necessary to the public welfare, cannot be justified under the "police power", but is instead an exercise of the eminent domain power. The Fifth Amendment requires that fair compensation be paid when the government exercises this latter power.

The government argues that it is well settled law that such forfeiture proceedings do not fall within the eminent domain power but are instead a proper exercise of the police power. The leading case in this area is *Goldsmith, Jr.-Grant Co. v. United States* (1920), 254 U.S. 505, 65 L. Ed. 376, 41 S.Ct. 189. In upholding the constitutionality of forfeiture under the Internal Revenue laws the court set out the theories

underlying forfeiture. Mr. Justice McKenna delivered the opinion of the court and stated at page 510:

> ". . . Congress must have taken into account the necessities of the government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion, and the ways and means of violation or evasion. In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand, by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds that 'that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punishable by such forfeiture.' And he observed: 'A like punishment is in like cases inflicted by the Mosaical law: "If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And, among the Athenians, whatever was the cause of a man's death by falling upon him, was terminated or cast out of the dominions of the republic.' See also The Blackheath (*United States v. Evans*) 195 U.S. 361, 366, 367, 49 L. ed. 236-238, 25 Sup. Ct. Rep. 46; Liverpool, *B. & R. P. Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal*, 251 U.S. 48, 53, 64 L. Ed. 130, 132, 40 Sup. Ct. Rep. 66."

The cases cited by the Government base their decisions on archaic principles (*i.e.*, Law of Deodand, Athenian Law, Mosaical Law) which have no place in the commercial practicalities of the Twentieth Century. This court has traditionally recognized that the manner in which our system views basic rights under the Constitution constantly undergoes change. In the case of *Lynch v. Household Finance Corp.* (1972), ... U.S. ...., 31 L. Ed. 2d 424, 92 S.Ct. ...., this court recently recognized this evolving nature in the following words:

> "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental inter-dependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.* (1972), ... U.S. ...., 31 L. Ed. 2d 424, 435 92 S.Ct. .....

Adherence to the archaic principle of Deodand serves only to perpetuate rules devised at a time when the concept of security interests was unknown. The law must change with the times. In discussing prejudgment wage attachments, a procedure long existent and with a mountain of precedent to support its use, the Supreme Court stated:

> "A procedural rule that may satisfy due process for attachments in general, [cite], does not

> necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern form. We deal here with wages—a specialized type of property presenting distinct problems in our economic system . . ." (*Sniadach v. Family Finance Corp.* [1969], 395 U.S. 337, 340, 23 L. Ed. 2d 349, 353, 89 S. Ct. 1820).

Even if it is assumed, *arguendo,* that the reasoning is acceptable, and that the "Law of Deodand", "Mosaical Law" and "Athenian Law" establish valid precedent for the concept of forfeiting the interest of an innocent party for the "public welfare", the Bank maintains that in actual fact and practice the government has gone beyond the limits established by such precedent. "The ox shall be stoned, *and his flesh shall not be eaten.*" The theory behind this is that the "thing" is tainted with evil and must be destroyed. The theory does *not extend* to taking the thing and putting it to a public use. There is no evidence that forfeited cars are destroyed and the government does not dispute the fact that they are made available to its agents for use and are used on training courses. The cars, in other words, are put to a public use. This goes beyond the limits of "police power" and regulations for public welfare. It clearly has become a condemnation for public use for which fair compensation must be paid. Failure to compensate the innocent lienholder is violative of the mandate of the Fifth Amendment.

It is clear that under our present day economic system the forfeiture procedure, which might have been appropriate to the property concepts of the common

law of the middle ages, is so inherently unfair that it violates due process and is therefore an unconstitutional exercise of congressional power which the courts have a duty to overthrow. As aptly stated by Mr. Justice Stewart in his concurring and dissenting opinion in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 392-393, 18 L. Ed. 2d 1249, 1268, 87 S.Ct. 1856:

> ". . .'It does seem possible that the nineteenth and twentieth centuries have contributed legal conceptions growing out of new types of business which make it inappropriate' for the court to base its 'overthrow of contemporary commercial policies on judicial views of the reign of Queen Elizabeth.'" (Citing Chaffee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 983).

The ultimate question to be asked is not whether a traditional doctrine is historically correct but whether that doctrine is a necessary or an acceptable construction of the Constitution (See *Bloom v. Illinois* [1968], 391 U.S. 194, Fn. 2, 20 L. Ed. 522, 88 S.Ct. 1444). The Bank contends that in the context of our present day society the forfeiture statutes constitute an unacceptable construction of the Constitution and are, in the words of Mr. Justice Holmes:

> "an unconstitutional assumption of powers . . . which no lapse of time or respectable array of opinion should make us hesitate to correct." (*Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 [dissenting opinion], cited in majority opinion in *Bloom v. Illinois*, [*supra*] at p. 198).

In summary, the Bank contends that the government is not properly exercising a "police power." Through appropriation of forfeited cars to its own use, the government has taken them for a public use and has failed to pay fair compensation to an innocent lienholder. This violates the precepts of the Fifth Amendment and the Bank contends that it is entitled to fair compensation for the subject vehicles in this action. Perhaps the best summation of this basic Fifth Amendment guaranty is provided by the words of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416; 67 L. Ed. 322, 43 S.Ct. 158:

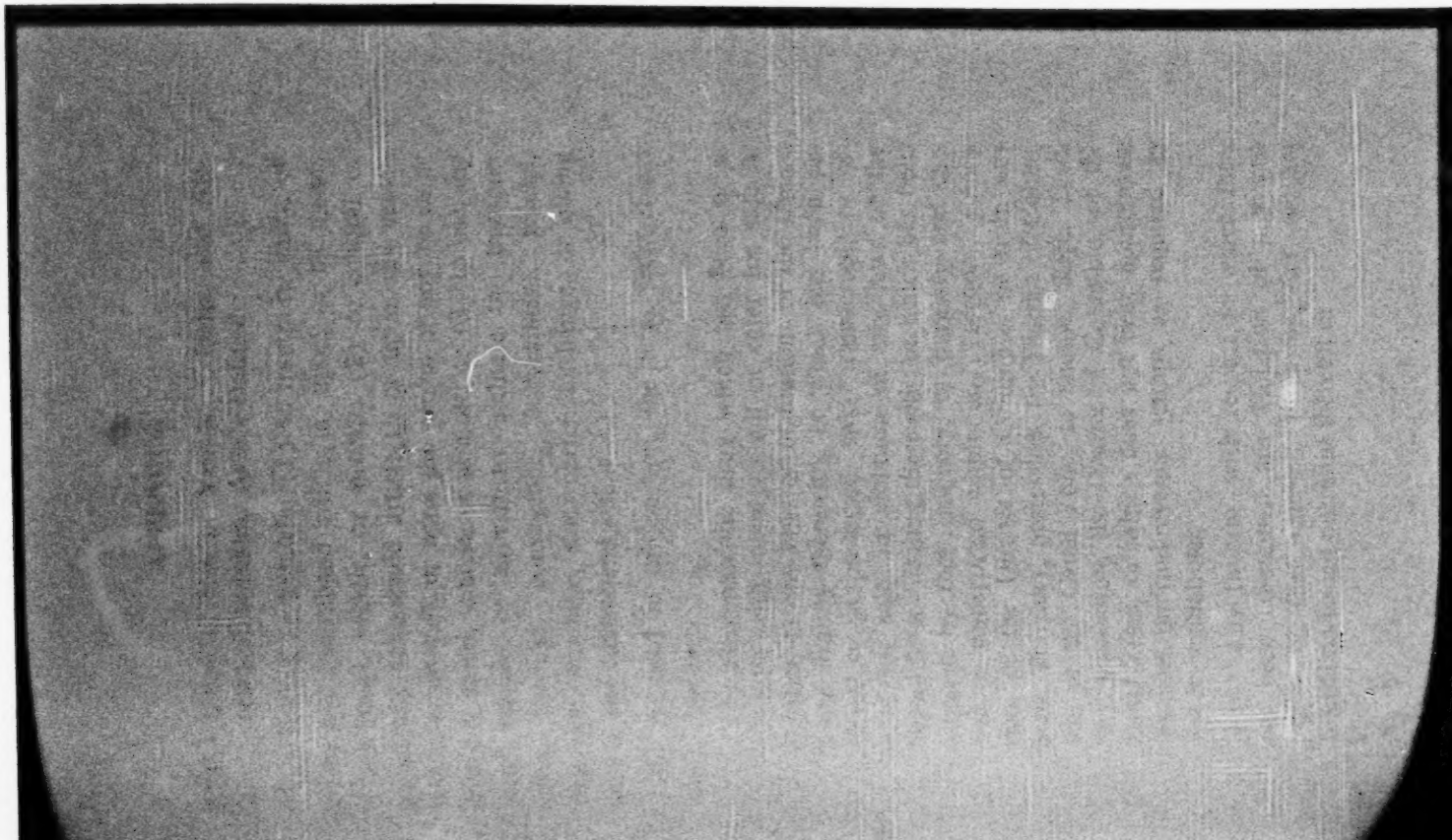
> ". . . The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . [Citing case.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> ". . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change. . ."

Conclusion.

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to the United States Court of Appeal for the Ninth Circuit in this case.

Respectfully submitted,

ROBERT H. FABIAN and
HARRIS B. TAYLOR;
ULLAR VITSUT and
STEVEN I. BUCK *(Of Counsel)*,
Attorneys for Petitioner.



APPENDIX.

§ 781. Unlawful Use of Vessels, Vehicles, and Aircrafts; Contraband Article Defined.

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Aug. 9, 1939, c. 618, § 1, 53 Stat. 1291; Aug. 9, 1950, c. 655, 64 Stat. 427.

§ 782. Seizure and Forfeiture.

Any vessel, vehicle or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided*, That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner or (2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further*, That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. Aug. 9, 1939, c. 618, § 2, 53 Stat. 1291.

Part 15—Policy With Respect to the Remission and Mitigation of Forfeitures Incurred by Vehicles Under Various Statutes Relating to Internal Revenue, Customs, Narcotics, and the Secret Service.

15.1 Remission and mitigation of forfeitures incurred by vehicles.

From time to time inquiries are received by the Treasury Department regarding the policy which it pursues in connection with mitigation and remission decisions with respect to automobile forfeitures incurred under various statutes administered by the Treasury Department through the Internal Revenue Service, The Bureaus of Customs, Narcotics and the Secret Service. Among such statutes are 19 U.S.C. 1594 (Customs), 49 U.S.C. 782 (Internal Revenue, Narcotics and Secret Service) and 26 U.S.C. 7301 and 7302 (Internal Revenue).

The Secretary of the Treasury by statute (19 U.S.C. 1618, 26 U.S.C. 7327 and 49 U.S.C. 784), and certain other Treasury officers by delegation from the Secretary, have discretionary authority to mitigate or remit forfeitures of this type. Relief is granted, from time to time, in favor of persons who have interests in the vehicles if the persons were not in any way involved in the violations. However, relief is not granted to one who made the vehicle available to the person involved in the violation with any knowledge, or the ability to know, that such person had a criminal record or reputation.

The Treasury Department desires to point out that in its exercise of its discretion it is guided by a standard similar to that which the Congress has established in 18 U.S.C. 3617(b) with respect to the mitigation and

remission by courts of forfeitures in connection with violations of the liquor laws. In relevant part that section provides that remission or mitigation shall not be allowed on behalf of any claimant "if it appears that the interest asserted by the claimant arises out of or is in any way subject to any contract or agreement under which any person having a record or reputation for violating laws of the United States or of any State relating to liquor has a right with respect to such vehicle or aircraft, [unless it appears] that, before such claimant acquired his interest, or such other person acquired his right under such contract or agreement, whichever occurred later, the claimant, his officer or agent, was informed in answer to his inquiry, at the headquarters of the sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of the liquor laws, or other principal local or Federal law-enforcement officer of the locality in which such other person acquired his right under such contract or agreement, of the locality in which such other person then resided, and of each locality in which the claimant has made any other inquiry as to the character or financial standing of such other person, that such other person had no such record or reputation."

In considering a person's record or reputation for crime, the Treasury Department does not, however, limit itself to crimes involving the liquor laws. It also considers other crimes, a record or reputation for which might reasonably lead to the belief that a person with such a record or reputation would be more prone than the normal to be involved in a violation leading to an automobile forfeiture.

[26 F.R. 4742, May 30, 1931].

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1967 Ford Mustang, 2-door Hardtop, Serial No. 7RO2C149263. California License No. WFJ 709, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 68-1988-TC.

Filed: March 25, 1970.

This matter came on for trial before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding; the matter having been duly tried and the parties having submitted the matter to the Court for its decision, the following are announced as the Court's Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant 1967 Ford Mustang was used and intended for use by George L. Owen to facilitate the transportation of counterfeit $10 Federal Reserve Notes on June 5, 1968.

2. There was probable cause for seizure of the defendant 1967 Ford Mustang and for the institution of this action.

3. The defendant 1967 Ford Mustang was seized on June 27, 1968, within the Central District of California.

4. The claimant, Bank of America National Trust and Savings Association, was the legal owner of the defendant 1967 Ford Mustang and was innocent of any wrong doing.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. § 1345 and 49 U.S.C. § 782.

2. The defendant 1967 Ford Mustang is subject to forfeiture.

3. The innocence of the claimant is no defense to these forfeiture proceedings.

DATED: This 25 day of March, 1970.

/s/ THURMOND CLARKE
Chief United States District Judge

Presented by: /s/ Larry L. Dier, Larry L. Dier, Assistant U. S. Attorney.

Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1967 Ford Mustang, 2-Door Hardtop, Serial No. 7RO2C14-9263, California License No. WFJ 709, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 68-1988-TC.

Filed: March 25, 1970.

This matter came on for trial before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding; the matter having been duly tried and the parties having submitted the matter to the Court for its decision, and the Court having announced its Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED, AND DECREED that the defendant 1967 Ford Mustang, 2-Door Hardtop, Serial No. 7RO2C149263, California License No. WFJ 709, its tools and appurtenances, be, and the same is hereby forfeited to the United States.

IT APPEARING that an application will be filed in this action by the Administrator of General Services, General Services Administration, pursuant to the provisions of 49 Stat. 880; 40 U. S. C. 3041 and 5 U. S. C. 630a, for delivery of the defendant 1967 Ford Mustang to Special Agent in Charge, Secret Service, U. S. Treasury Department, Los Angeles, California, for official use,

NOW, THEREFORE, IT IS ORDERED that said 1967 Ford Mustang, 2-Door Hardtop, Serial No. 7R02C149263, California License No. WFJ 709, its tools and appurtenances, be delivered by the United States Marshal to the Special Agent in Charge, Secret Service, U. S. Treasury Department, Los Angeles, California, or his duly authorized representative, upon the filing of said application, for official use, and when no longer needed for official use by said Special Agent in Charge be disposed of in the same manner as other surplus property in accordance with law.

IT IS FURTHER ORDERED that the plaintiff shall have costs for Marshal Fees in the amount of $24.42 and Clerk and Docket Fees in the amount of $35.00.

DATED: This 25 day of March, 1970.

/s/ THURMOND CLARKE
Chief United States District Judge

Presented by: /s/ Larry L. Dier, Larry L. Dier, Assistant U. S. Attorney.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1965 Ford Country Sedan Station Wagon, Serial No. 5J74-X107131, License No. MJX 115, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 69-1178-TC.

Filed: March 11, 1970.

This matter came on for trial before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding; the matter having been duly tried and the parties having submitted the matter to the Court for its decision, the following are announced as the Court's Findings of Fact and Conclusions of Law:

1. The defendant 1965 Ford Country Sedan Station Wagon was used and intended for use by Daniel Migdol to facilitate the transportation of counterfeit $20 Federal Reserve Notes on August 7, 1968.

2. There was probable cause for seizure of the defendant 1965 Ford Country Sedan Station Wagon and for the institution of this action.

3. The defendant 1965 Ford Country Sedan Station Wagon was seized on August 10, 1968, within the Central District of California.

4. The claimant, Bank of America National Trust and Savings Association, was the legal owner of the defendant 1965 Ford Country Sedan Station Wagon and was innocent of any wrongdoing.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. § 1345 and 49 U.S.C. § 782.

2. The defendant 1965 Ford Country Sedan Station Wagon is subject to forfeiture.

3. The innocence of the claimant is no defense to these forfeiture proceedings.

Dated: This 11 day of March, 1970.

/s/ THURMOND CLARKE
Chief United States District Judge

Presented by:

/s/ Eugene Kramer, Eugene Kramer, Assistant U. S. Attorney.

Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1965 Ford Country Sedan Station Wagon, Serial No. 5J74-X107131, License No. MJX 115, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 69-1178-TC.

Filed: March 11, 1970.

This matter came on for trial before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding; the matter having been duly tried and the parties having submitted the matter to the Court for its decision, and the Court having announced its Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED, AND DECREED that the defendant 1965 Ford Country Sedan Station Wagon, Serial No. 5J74X107131, California License No. MJX 115, its tools and appurtenances, be, and the same are hereby, forfeited to the United States.

IT IS FURTHER ORDERED that the said 1965 Ford Country Sedan Station Wagon, Serial No. 5J74X-107131, License No. MJX 115, its tools and appurtenances, be sold by the United States Marshal at public auction; and that the said United States Marshal pay the proceeds of sale to the District Supervisor, Bureau of Narcotics, 450 Golden Gate Avenue, Box 36035,

San Francisco, California, and make his return thereof into Court, after deducting all expenses incident to said seizure, forfeiture and sale.

IT IS FURTHER ORDERED that the plaintiff shall have costs for Marshal Fees in the amount of $27.19 and Clerk and Docket Fees in the amount of $35.00.

Dated: This 11 day of March, 1970.

/s/ THURMOND CLARKE
Chief United States District Judge

Presented by: /s/ Eugene Kramer, Eugene Kramer, Assistant U. S. Attorney.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1965 Chevrolet, 2-Door Hardtop, Serial No. 166375C13-6893, License No. RIW 262, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 68-1993-TC.

Filed: May 20, 1970.

This action came on for trial on April 27, 1970, before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding, and the matter having been submitted to the Court for its decision, the following are announced as the Court's Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the defendant 1965 Chevrolet was seized by duly authorized agents of the United States Secret Service, Treasury Department of the United States.

2. That the defendant 1965 Chevrolet was used and intended for use by Bernard A. Shapiro to facilitate the transportation of counterfeit Federal Reserve Notes on May 10, 1968 and June 5, 1968.

3. The claimant, Bank of America National Trust and Savings Association, was innocent of any wrongdoing and had no knowledge that the defendant Chevrolet would be used in violation of the law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 49 U.S.C § 782.

2. The innocence of the claimant is not a defense to this forfeiture action.

3. Forfeiture of defendant vehicle is not a denial of due process of law nor a taking of private property for public use without fair compensation.

DATED: This 28 day of May, 1970.

/s/ THURMOND CLARKE
Chief United States District Judge

Presented by: /s/ David H. Anderson, David H. Anderson, Assistant U. S. Attorney.

Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, v. One 1965 Chevrolet, 2-Door Hardtop, Serial No. 166375013-6803, License No. RIW 262, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant. Civil No. 68-1993-TC.

Filed: May 20, 1970.

This action came on for trial on April 27, 1970, before the Court, the Honorable Thurmond Clarke, Chief United States District Judge, presiding; the Court having announced its Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the defendant 1965 Chevrolet, 2-Door Hardtop, Serial No. 1663750136893, License No. RIW 262, its tools and appurtenances, be, and the same are hereby, condemned and forfeited to the United States of America.

IT IS FURTHER ORDERED that the United States Marshal transfer the defendant 1965 Chevrolet, 2-Door Hardtop, Serial No. 1663750136893, License No. RIW 262, its tools and appurtenances to the District Director of Customs, 300 South Ferry Street, Terminal Island, California, for appropriate disposition pursuant to 19 U.S.C. § 1611, and make his return thereof in Court.

IT IS FURTHER ORDERED that the plaintiff shall have its costs for Marshal Fees and Court Costs.

DATED: This 20 day of May, 1970.

THURMOND CLARKE
Chief United States District Judge

Presented by:

DAVID H. ANDERSON
Assistant U. S. Attorney

I Hereby Certify That on the 28th Day of May 1969, I Released the Within Named Automobile to the District Director of Customs by Letter.

Gaylord L. Campbell
United States Marshal
By J. P. Higgins
JOHN P. HIGGINS
Administrative Assistant

Appeal From the United States District Court for the Central District of California.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, v. One 1967 Ford Mustang, 2-Door Hardtop, Serial No. 7R02C14-9263, California License No. WFJ 079, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant-Appellant. No. 25827.

United States of America, Appellee, v. One 1965 Ford Country Sedan Station Wagon, Serial No. 5J74-Z107131, License No. MJX 115, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant-Appellant. No. 25830.

United States of America, Appellee, v. One 1965 Chevrolet, 2-Door Hardtop Serial No. 166375C1368-93, License No. RIW 262, its tools and appurtenances, Defendant. Bank of America National Trust and Savings Association, Claimant-Appellant. No. 26055.

Filed: March 21, 1972.

Before: CHAMBERS and ELY, Circuit Judges, and BATTIN, District Judge.*

ELY, Circuit Judge:

The subject appeals involving identical issues, have been consolidated for all purposes. In each instance, the appellant [hereinafter "the Bank"] purchased a motor vehicle security agreement from the selling dealer after conducting a thorough credit investigation of each purchaser. The Bank thus became the legal owner

*Honorable James F. Battin, United States District Judge. Billings, Montana, sitting by designation.

of the vehicles. Thereafter, the vehicles were used to facilitate the transportation of counterfeit Federal Reserve Notes, a violation of 49 U.S.C. § 781, and, because of that use, they were seized by special agents of the United States Secret Service. The Attorney General then denied the Bank's petition for remission of the automobiles because the Bank, prior to purchasing the security agreements, had failed to inquire of either the Bureau of Customs, the Bureau of Narcotics and Dangerous Drugs, or the Los Angeles, California, County Clerk to determine whether the purchasers of the vehicles had any prior record for commercial crimes. The United States instituted complaints in the District Court, praying that the subject vehicles be forfeited as provided in 49 U.S.C. § 782. The District Court entered judgment in each case that the automobile be forfeited, and these appeals followed.

The issues concern the nature and effect of forfeiture proceedings under 49 U.S.C. §§ 781 and 782. The Bank contends that these statutes are penal in nature and thus unconstitutionally vague insofar as they are applied to penalize an innocent lienholder. Alternatively, it argues that the forfeiture proceedings under these statutes amount to an exercise of the power of eminent domain and, as applied effect the taking of property without due process of law. In addition, the Bank claims that the denial of its petition for remission is reviewable on the ground that the Attorney General failed to exercise any discretion in the matter due to his reliance on an arbitrary checklist.

The Bank urges with considerable force that because of changing commercial circumstances, the forfeitures worked an intolerable injustice upon it. The Bank's insurmountable obstacle, however, is the solid wall of authority against its position. The challenge to section 781 is clearly without merit. That provision is not vague. *See Platt v. United States*, 163 F. 2d 165, 166-67 (10th Cir. 1947). Nor does it operate to deprive the lienholder of his property except insofar as it affords the basis for invoking the forfeiture statute, which very specifically provides:

> "Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has or is taking place, shall be seized and forfeited . . . ."

49 U.S.C. § 782. The Bank's argument that this provision is penal in nature is undermined by our court's prior holding that a forfeiture proceeding under section 782 "is primarily a proceeding *in rem* against the automobile." *United States v. Andrade*, 181 F. 2d 42 (9th Cir. 1950). Moreover, even if we were free to accept the Bank's characterization of the statute, the definitive clarity of the statutory language precludes a judgment that the enactment is unconstitutionally vague. *See, e.g., United States v. One 1962 Ford Thunderbird*, 232 F. Supp. 1019, 1021 (N.D. Ill. 1964). In addition, it has been consistently held that these "*in rem*" proceedings do not constitute a taking of private property for public use under the Fifth Amendment,

but rather that they constitute an exercise of the police power. *See, e.g., Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 65 L. Ed. 376, 41 S. Ct. 189 (1921). *But cf. United States v. United States Coin & Currency*, 401 U.S. 715, 719-21, 28 L. Ed. 2d 434, 438-39, 91 S. Ct. 1041, 1043-44 (1971) (dicta).[1]

We are not convinced that we should undertake to break or hurdle the foregoing wall of authority. Nor, we think, can we override the authority which Congress has delegated to the Attorney General in respect to remission proceedings in cases like these. 19 U.S.C. § 1618; *see United States v. Andrade, supra* at 46; *United States v. One 1962 Ford Thunderbird, supra* at 1023. While we are not unsympathetic to the position of innocent lenders such as is the Bank in these cases, only the Congress or the Supreme Court may, at this time, afford the sought protection.

Affirmed.

United States Circuit Judges
United States District Judge

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[1]The dicta in *United States Coin & Currency* may portend the demise of the doctrines upon which we must base our decision, but the Court's failure to overrule *Goldsmith-Grant Co.* and its progeny discourages our disregarding the authoritative effect of those cases. *See United States v. United States Coin & Currency*, 401 U.S. 715, 719-21 (1971).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1640

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, having interests under conditional sales contracts in three automobiles which were forfeited in separate actions under 49 U.S.C. 782 because they had been used to facilitate the transportation of counterfeit Federal Reserve notes in violation of 49 U.S.C. 781, was denied remission or mitigation of the forfeitures by the Attorney General since it had negligently failed to make adequate inquiry concerning the criminal records or reputations of the purchasers of the vehicles at the time that it acquired the contracts. In a combined appeal, the court of appeals affirmed.

Petitioner contends here (as it did in both courts below) that it was deprived of its rights under the Fifth Amendment because (1) the forfeitures constituted penal sanctions for conduct on its part which was not criminal, (2) the applicable statutes are unconstitutionally vague in that they fail to give adequate notice of the conduct required of the lienholder in order to avoid the penal sanctions, and (3) if the applicable statutes are civil rather than penal in nature, the forfeitures constituted a taking of its property interests without just compensation.

Petitioner's contentions are without merit. Assuming the vehicle forfeitures were penal in nature (cf. *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721–722), their penal impact was upon the purchasers of the vehicles, not upon petitioner. While, as lienholder, petitioner was technically the legal owner of the vehicles, its interests in them were reversionary only; the vehicles served as security for the debts owed to it by the purchaser. The forfeitures did not extinguish these debts since, despite losing possession of the vehicles, the purchasers are still liable under the contracts. It is this continuing liability, in fact, which gives the forfeiture statute its impact. See *United States* v. *One 1941 Pontiac Sedan*, 83 F. Supp. 999, 1000–1001 (S.D. N.Y.). When a forfeited vehicle is remitted to a lienholder, the purchaser's debt is thereby satisfied and his only loss is his equity in the vehicle—frequently minimal due to the vehicle's depreciation. Petitioner's real contention is thus that its claim against the vehicles as satisfaction of the purchasers' debts should be afforded legal precedence

over the government's forfeiture claims. It is not a violation of the Fifth Amendment to deny a lienholder that precedence if, as here, it negligently failed to make the necessary inquiries when the debts were contracted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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71-1640

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term
No. ____

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

Petitioner, Bank of America National Trust and Savings Association prays that this Court grant rehearing of its Order of October 10, 1972 denying the petition for a Writ of Certiorari and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgments of the United States District Court in the instant case appears to be in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case of *McKeehan v. United States,* 438 F.2d 739, as well as with the case of *United States v. U. S. Coin & Currency,* 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041.

The court in *McKeehan v. United States (supra)* at page 745 expressly "destroyed" the legal fiction that inanimate objects can be guilty of wrongdoing and then went on to find that under the Fifth Amendment the imposition of forfeiture in case of an innocent party is penal and causes an unconstitutional deprivation of personal property without just compensation.

The leading case in the area of forfeiture is the recent Supreme Court case of *United States v. U. S. Coin & Currency,* 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041, where the Court concluded at pages 721-722 as follows:

> "When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."

Conclusion.

Since the trial court expressly found that petitioner was innocent of any wrongdoing, it is respectfully urged for the reasons set forth above and in the Petition for a Writ of Certiorari, that rehearing be granted herein and that a Writ of Certiorari issue to the Court of Appeals for the Ninth Circuit to review the judgment below.

Respectfully submitted,

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HARRIS B. TAYLOR,
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Attorneys for Petitioner.

STEVEN I. BUCK,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HARRIS B. TAYLOR,
Counsel for Petitioner.